

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

CHRISTOPHER SMITH,

Petitioner,

: Case No. 1:12-cv-425

- vs -

District Judge Timothy S. Black
Magistrate Judge Michael R. Merz

WARDEN, Toledo Correctional
Institution,

:

Respondent.

ORDER REGARDING REMAND

This habeas corpus case is before the Court on remand from the Sixth Circuit Court of Appeals.

Having examined the State Court Record, the Magistrate Judge finds it is not indexed in accordance with current practice in this Court in habeas cases, probably because it was filed so long ago. It is accordingly ORDERED that the State Court Record be re-filed not later than October 29, 2019, and “be indexed by insertion of “bookmarks” in the .pdf version of the state court record uploaded to the Court’s CM/ECF system which display each exhibit and the name of that exhibit in the record.”¹

Additionally, having read the parties briefs, the Magistrate Judge is confused on an issue which does not appear to have been briefed. In the Report and Recommendations, the Magistrate Judge recommended that Ground One be dismissed for the procedural default of failing to present it to the Ohio Supreme Court on direct appeal (ECF No. 80). The Sixth Circuit

¹ This is language which appears in the Court’s current form Order for Answer in § 2254 cases.

appear to have found that this procedural default is excused by the ineffective assistance of appellate counsel. Because the record is not yet properly indexed, the Magistrate Judge is having difficulty following the procedural history. Counsel are requested to brief, not later than fourteen days after the State Court Record is re-filed and in not more than ten pages, whether any direct appeal was taken at all to the Ohio Supreme Court. Since a criminal defendant is not entitled to appointed counsel for such an appeal, it is not clear how counsel's failure at that point could excuse the default.

October 15, 2019.

s/ *Michael R. Merz*
United States Magistrate Judge